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# International liability for injurious consequences arising out of acts not prohibited by international law (International liability in case of loss from transboundary harm arising out of hazardous activities)

## Comments and observations received from Governments

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# I. Introduction

At its fifty-sixth session, the International Law Commission adopted, on first reading, draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[1] In paragraphs 29 and 30 of the report, the Commission stated that it would welcome comments and observations from Governments on all aspects of the draft principles and the commentaries to those principles, including in particular on the final form. In paragraph 173 of its report, the Commission decided, in accordance with articles 16 and 21 of its statute, to request the Secretary-General to transmit the draft principles to Governments for comments and observations, requesting also that such comments and observations be submitted to the Secretary-General by 1 January 2006. The Secretary-General transmitted a circular note to that effect on 24 October 2004. In paragraph 3 of General Assembly resolution 59/41 and paragraph 3 of resolution 60/22, the General Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft principles.

As at 26 January 2006, replies had been received from the following States: the Czech Republic, Lebanon, Mexico, the Netherlands, Pakistan, the Syrian Arab Republic, the United States of America and Uzbekistan. The replies have been organized thematically, starting with general comments and continuing on a principle-by-principle basis.

# II. Comments and observations received from Governments

## A. General comments

### Czech Republic

The draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities are a promising tool for the progressive development of international law. However, according to the Czech Republic the present version poses some problems. Of course, other problems may yet arise as the text of the instrument develops towards its final version. The Czech Republic would like to take a closer look at the following three issues, which are discussed further below, with respect to principles 2, 3, 4 and 6: (a) the broad definition of "damage", including damage caused to the environment in principle 2; (b) the proposed solution for "prompt and adequate compensation" in principles 3 and 4; and (c) the proposed solution for "international and domestic remedies" in principle 6.

[1] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 175.

**Lebanon**[2]

... Whereas the Commission, meeting at the United Nations Office at Geneva in its said fifty-sixth session, was composed of 34 experts in international law representing the world's various continents,

And whereas the Panel did not, in fact, find the text of the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities to contain anything contrary to the laws and regulations on which Lebanon is founded.

**Mexico**

Mexico attaches great importance to the topic. The Commission's efforts will result in the strengthening of existing rules on international environmental damage, to which States committed themselves in the Rio Declaration on Environment and Development.[3]

With regard to the substance of the draft in question, Mexico wishes to make the following comments:

(a) In general, Mexico agrees with the substantive aspects of the draft. With respect to its scope, Mexico agrees that a regime of a general and residual character should be established;

(b) Mexico agrees with the Commission that the type of liability that would arise out of environmental damage under the draft principles should be strict liability rather than absolute liability;

(c) Mexico firmly believes that the crux of the Commission's work on this subject is the principle that an innocent victim should not be left to bear loss as a result of transboundary harm. We welcome the fact that the Commission's work is directed towards a regime that provides for prompt and adequate compensation for innocent victims. As the Commission itself points out, this approach is consistent with principles 13 and 16 of the Rio Declaration.

**Netherlands**

The Netherlands would observe that the introduction of the draft principles by the Commission promotes an important new idea in international law, namely the existence of an obligation on States to regulate compensation in the event of transboundary harm arising from hazardous activities that are not in themselves unlawful. Examples include both large-scale industrial activity that is directly hazardous (toxic discharges and the like) and activities such as those creating air pollution that can in the long term cause harm across a State's boundaries. Moreover, the principles stipulate not only that States are liable to pay compensation

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[2] The preambular parts of the response prepared by the Legislative and Consultation Panel of the Ministry of Justice of Lebanon, which substantially reproduced the text of the eight draft principles, has been omitted and is available for consultation from the Codification Division of the Office of Legal Affairs.

[3] *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, vol. I, *Resolutions Adopted by the Conference* (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

to one another but also explicitly recognize the right of individual victims to claim compensation, although individuals are not granted specific legal remedies.

The principles represent an extension of the classical rules of State responsibility in which responsibility must always be based on a wrongful act. If a victim cannot prove that the harm suffered arose from a wrongful act, there can be no question of compensation (*ubi jus, ibi remedium*: only the violation of a right creates entitlement to a remedy). The principles, however, no longer apply this doctrine absolutely. The harmful activities are not wrongful and need not be prohibited by law. However, against this right to perform what are often economically significant hazardous activities, the principles place the obligation on States — individually and collectively — to ensure "prompt and adequate" compensation for damage caused.

The Netherlands concludes that the principles constitute a significant contribution to the development of international law, because they include such progressive elements as the recognition that there are hazardous activities which are not unlawful but which impose a responsibility on States which undertake and/or permit them. Given the continuing increase in — and the economic significance of — such activities, the importance to society of the growing acceptance of that principle speaks for itself. In this way, States can be made more conscious of their responsibilities in regard to hazardous activities — enacting legislation, monitoring compliance, punishing non-compliance and so on — and more compensation can be provided for victims, while economic development driven by the activity in question still remains possible.

Another positive factor is that the Commission argues that victims of transboundary damage should be compensated as far as possible and that States have, and should accept, a responsibility to do so.

Given the position taken by States, the Netherlands is pleasantly surprised that such an agreement on the principles could be reached within the Commission, although it still takes the view that a remedy should be available to individual victims. The Netherlands would also observe that the commentary contained in the Commission's report really goes no further than annotating the principles.

**Pakistan**

The draft principles are very general and potentially have a very wide scope. An example of this is the "significant" threshold in draft principles 1 and 2. In addition, very broad definitions of "damage" and "environment" have been given in draft principle 2. It is therefore felt that there is dire need to re-examine the draft principles with an aim to define different aspects clearly and to be more specific.

The draft principles are basically designed for hazardous activities, but at no stage have the hazardous activities been specified, nor have any examples been elaborated in the commentaries provided, except nuclear fallout. It is therefore felt that there is a need to define the list of activities that fall under this law. In addition, transboundary harm caused to a neutral State in case of war between two or more States has not been touched upon in the draft principles. Therefore, it is suggested that the scope of "liability" be broadened and that the States responsible for such activity be included.

Any hazardous activity caused by terrorist activity could be included in the principles. Transboundary damage caused by any benign activity, such as the storage of water in dams, could also be covered in the draft principles.

Damage or loss caused by hazardous activities should be compensated by the "operator" and not by the State in which he or she operates. Therefore, alternative B concerning principle 4, "Prompt and adequate compensation", as proposed by the Special Rapporteur, is supported.[4]

International judicial legislation is required in the case of a dispute which arises between operators and States and which may be a part of the principles. To address such cases, an international compensatory authority could be established to provide efficient compensation to victims.

There should be a monitoring set-up to measure and study pollution generated by different countries. The data should conform with international quality and standards.

A third-party institution could be provided for arbitration, as the draft principles do not address situations in which the operator or entity fails or refuses to pay compensation to the victims.

Safeguards could be provided for lower riparian States to protect them from transboundary hazardous activities through river system flows from neighbouring States. The risk of significant transboundary harm from their physical consequences should not be ignored.

Likewise, an increased level of greenhouse and other hazardous gases attributed to enhanced industrial activities in neighbouring countries or to pollution of the sea in coastal areas owing to shipping activities would need a stronger and more effective national and international legal framework for compensation for the damages emanating therefrom, not otherwise prohibited by extant international laws.

**Syrian Arab Republic**

Owing to the need to establish the legislative, administrative and regulative measures necessary to implement such principles, draft principles 4 to 8 should be clearer and should be reformulated.

Research in the field of treaties recognizes the need for measures to implement the principles. However, it is also recognized that national legislatures are the bodies entitled to enact such measures.

**United States of America**

Recalling that the draft principles are distinct from and without prejudice to the work of the Commission on the topic of State responsibility in that they address the question of "liability" in instances where harm results from an act or omission that involves *no violation of an international law duty*,[5] we wish to state clearly

[4] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), footnote 342.

[5] Emphasis as submitted by the Member State.

that, in the view of the United States, the draft principles are clearly innovative and aspirational in character and not descriptive of current law or State practice.

That said, the Commission has crafted a framework that might help guide States in the circumstances the Commission identifies in the report of its fifty-sixth session. Specifically, the report of the Commission states that the principles are "intended to contribute to the further development of international law in this field *both by providing appropriate guidance to States in respect of hazardous activities not covered by specific agreements* and *by indicating the matters that should be dealt with in such agreements*".[6]

With respect to the matter of guidance related to hazardous activities not covered by international agreements, we wish to note a number of aspects of the Commission's draft principles that may bear particular consideration by States in specific contexts: (a) the principles carefully address their scope of application, that is, the scope is limited to specific activities involving a risk of causing significant transboundary harm through their physical consequences and to damage caused in the territory or other places under the jurisdiction or control of States; (b) the principles do not presuppose that it is only the "operator" of an activity who should be liable in any given context; and (c) the principles recognize that there might be specific conditions, limitations or exceptions to liability.

With respect to indicating the matters that should be dealt with in international agreements relating to hazardous activities, we believe that the Commission's work is helpful in highlighting many of the important questions that must be addressed by States involved in crafting any specific liability regime related to hazardous activities, for example: (a) What type of damage can be compensated? Direct economic damages to plaintiffs only? Environmental damages? (b) Is there a particular threshold at which damage entails liability, for example, significant damage or exceptional damage? (c) What types of remedies should be available? (d) Will there be a financial limit on liability? (e) How will causation be established? (f) Who is liable under the regime? Private operators? Private persons other than operators? States? (g) What is the standard for liability: absolute, strict, other? (h) What defences are available in the case of strict and fault-based regimes: armed conflict, act of nature, compliance with public permit? (i) What is the forum for liability claims? (j) Is the liability regime exclusive, default, supplemental? and (k) Will the regime apply retroactively or prospectively only? If prospectively, is this from the date of the act or omission or the date when damage becomes known?

**Uzbekistan**

There has long been a need to develop and adopt a single international convention of the United Nations on the international liability of States for harm arising out of hazardous activities.

The draft principles have been discussed by the international community at length. Uzbekistan believes that the draft principles treat transboundary harm in a sufficiently fair manner, address the issue of compensation and provide local remedies for victims. Nevertheless, Uzbekistan believes that it would make sense to incorporate in principle 4, on prompt and adequate compensation, alternative B

[6] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 176, General commentary, para. (6). Emphasis added by Member State.

proposed by the Special Rapporteur,[4] as it imposes a large share of liability on the operator of the hazardous activity rather than on the State. Other rules are more easily specified in bilateral or regional agreements.

It is necessary to define in the draft principles which body will assess the transboundary harm and which currency will be used, taking into account that each State has a different national currency.

## B. Preamble

### Netherlands

In the opinion of the Netherlands, the core of the principles can be found in the fifth preambular paragraph: "prompt and adequate compensation" must be provided as far as possible for victims of incidents that cause transboundary harm or loss. With respect to judicial proceedings, the Netherlands observes that provision should be made for the possibility that States could be held liable as operators (cf. the Vienna Convention on Civil Liability for Nuclear Damage[7]).

The fifth preambular paragraph uses the qualifying phrase "as far as possible", a limitation that does not appear anywhere else in the principles. The Netherlands takes the view that this phrase should be deleted.

## C. Principle 1 — Scope of application

### Netherlands

The Netherlands observes that the use of the adjective "significant" to qualify "transboundary harm" raises the threshold for applying the principles (see also principle 2). The Netherlands is aware that the word "significant" appears in the draft articles on Prevention of Transboundary Harm from Hazardous Activities.[8] However, the obligations in the principles should not be equated with those in the draft articles. The latter apply between States only, whereas the principles are concerned with providing a remedy for individual victims as well.

In this connection, the Netherlands refers to the Vienna Convention on Civil Liability for Nuclear Damage. For the allocation of loss, that Convention does not require the harm incurred to be significant. This is related to the concept of strict liability used in the Convention. Nor do other liability regimes apply a similar threshold. It is true that the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment refers to "tolerable levels" of environmental impact,[9] and annex VI to the Protocol on Environmental Protection to the Antarctic Treaty[10] limits liability in the event of response action to environmental emergencies, but neither represents a typical form of civil liability.

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[7] United Nations, *Treaty Series*, vol. 1063, No. 16197.

[8] See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10 and Corr.1), para. 97.

[9] See Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano Convention), (*European Treaty Series*, No. 150), article 8 (d).

[10] *International Legal Materials*, vol. XXX, No. 6, p. 1461.

The Netherlands is of the opinion that the non-discrimination principle does not allow for any difference in the treatment of foreign and domestic victims of harm caused by the same activity: the aim of the principles is to ensure that, while foreign victims do not have to show that they suffered significant damage and are compensated only for such damage, victims within the State's boundaries are not subject to the same burden of proof and are compensated for all the harm suffered.

The Netherlands further observes that any assessment of whether harm is "significant" is time-related and hence restrictive when it comes to the right to compensation. Harm suffered in the past might well have been acceptable according to the views prevailing at the time or might not even have been noticed. However, advances in understanding, for example of environmental impacts, may reveal later that the harm was indeed significant. Nonetheless, compensation can be paid only if, according to the current state of scientific knowledge, it can be predicted that significant harm could be caused by the hazardous activity in question. With respect to the "significant" threshold, it should also be noted that activities will generally be hazardous each time they are performed. However, a hazard may also lie concealed in the repetition of activities, each of which is individually acceptable but which can cumulatively cause significant harm. It becomes even more difficult to recover compensation for harm that does not come to light until much later because shorter limitation periods are often applied in respect of strict liability than in respect of general liability.

The Netherlands concludes that the restriction implicit in "significant" makes it all the more important for the principle of non-discrimination enshrined in paragraph 2 of principle 8 to be given greater prominence and to be moved up the list of principles.

## D. Principle 2 — Use of terms

### Czech Republic

Draft principle 2 defines "damage" as "significant damage caused to persons, property or the environment". The definition is very broad as it includes the following, according to the draft:

> "(i) loss of life or personal injury; (ii) loss of, or damage to, property, including property which forms part of the cultural heritage; (iii) loss or damage by impairment of the environment; (iv) the costs of reasonable measures of reinstatement of the property, or environment, including natural resources; and (v) the costs of reasonable response measures."

It should be admitted, and the Commission does so, that there have been hesitations as to whether to accept liability for damage caused to the environment per se in cases where no damage is caused to persons or property. The Commission eventually noted that the situation was changing continuously and apparently opted for the path of progressive development of law. It noted that, in the case of damage caused to natural resources or to the environment, there existed a right to compensation for the cost of reasonable prevention, restoration and reinstatement measures (of course, the question remains which measures can be called "reasonable"). Such progressive development towards broader definition of

compensable damage should not be a priori rejected. The risk of abuse might arise only in connection with substantive and procedural conditions of compensation.[11]

**Mexico**

Mexico recognizes the Commission's wisdom in including the concept of damage to the environment per se. This underlines the importance of environmental protection for the international community at all times, with an emphasis on allocating liability for the damage caused and for the consequences of it. It is true that assessing the cost of environmental damage presents difficulties, and we therefore suggest that the Commission should encourage States, in commenting on the draft principles, to explore this question further, including the concept of non-use value.

**Netherlands**

In the interests of better protection of victims, the Netherlands supports the fairly wide definition of "damage" used in principle 2, including not only personal injury and damage to property but also other financial loss and environmental damage.

The Netherlands observes that it will be no simple matter to approach value determination objectively and scientifically, especially in relation to environmental damage. By way of illustration, consider the rhetorical question of the financial value to be placed on the extermination of the dodo.

The Netherlands notes that the global commons (such as the open sea) are not covered by the principles, in which "transboundary" means "across the boundary of another State". To fall within the scope of the principles, damage must be caused in the territory of a State or in places under the jurisdiction or control of a State, in line with the Commission's draft articles on Prevention of Transboundary Harm from Hazardous Activities. As with the draft articles, the Netherlands believes this lack of coverage to be an omission.

In the opinion of the Netherlands, it would have been better if the terms "State of origin", "State likely to be affected" and "States concerned" used in the commentary of the Commission on the draft principle[12] had been included in principle 2 in the interest of more uniform definitions, given the connection between the terms used and the scope of application of the principles.

On the definition of "Environment" in paragraph (b) as including "natural resources", it may be remarked that the term "natural resources" generally has very functional, economic connotations. In this case, however, "natural resources" is — rightly — being used more comprehensively. The definition encompasses not only the individual factors, but also the interaction between them.

[11] See also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 176, Principle 6, Commentary.

[12] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 176, Principle 2, Commentary, para. (23).

Following paragraph (e), which defines "Operator", the Netherlands proposes adding paragraph (f), as follows: "'Person' means any natural or legal person", to ensure that the principles apply to both natural and legal persons or to a combination of the two. This proposal is particularly relevant to the imposition of liability.

**Uzbekistan**

It is necessary to determine whether the terms used in principle 2 are consistent with the definitions given in the international instruments currently in force: the Convention on International Liability for Damage Caused by Space Objects;[13] the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;[14] the Stockholm Declaration of the United Nations Conference on the Human Environment;[15] and the Rio Declaration on Environment and Development.

For example, the definition of the term "damage" in the draft principles does not include the destruction of or damage to State property and property of legal persons. That omission must be corrected. There is also a need to define more specifically the concept of "transboundary damage".

The concept of the "environment" must be more clearly worded to cover both the natural environment and the human environment.

Uzbekistan considers it advisable to define the concept of "damage to property" in subparagraph (a) (ii) of principle 2. The level of damage to property that might be considered "significant damage" is also not clear from the text of the draft principle.

The level of loss or damage that might be considered "damage to the environment", that is, the degree of harm reflected in the impairment of natural resources or of the environment, should be defined in paragraph (b) of draft principle 2.

Subparagraph (a) (iv), of principle 2, would be better put, in our view, as follows: "Expenditures on measures actually taken for reinstatement of the property or natural resources or environment."

## E. Principle 3 — Objective<br>Principle 4 — Prompt and adequate compensation

**Czech Republic**

With regard to the objectives of the document, the Czech Republic's position is that rather than restricting the scope of the definition of damage it seems better to balance out the progressive development of law by refining it, especially in regard to conditions for compensation, relationships between individual claims and restrictions imposed on them, so that the total compensation does not eventually exceed the overall cost of damage.

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[13] Resolution 2777 (XXVI), annex.

[14] United Nations, *Treaty Series*, vol. 1673, No. 28911.

[15] Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1992 (United Nations publication, Sales No. E.73.II.A.14 and corrigendum), chap. I.

Principles 3 and 4, which should be read in conjunction with each other as well as in conjunction with the preamble, provide for "prompt and adequate compensation" to all victims of transboundary damage; they may be natural or legal persons, but also States. It is obvious that in the case of damage caused to the environment per se (i.e. not to any individual person or property), States will be the entities entitled to sue. Indeed, in practice it is usually the State that bears the costs of sanitation and restoration measures. However, instead of providing for the international liability of States, the draft principles establish a general compensation regime for all, based probably on the principle of no-fault liability arising from civil law.

According to the draft principles, the State assumes no direct obligation to compensate for the damage, but only undertakes to set up, within its internal legislation, a functioning system to ensure "prompt and adequate compensation" to all entitled, that is, injured entities, if the damage was caused by activities located within the State's territory or otherwise under its jurisdiction or control. The liable entity (entitled to be sued) would, as a rule, be the operator of the hazardous activity, but it might also be the person exercising control at the moment of the accident leading to the damage, or another person most capable of providing compensation. However, this departure from the principle of "concentrated liability" (which normally prevails in special treaties) means that the injured party would be entitled to claim compensation from more than one entity. That may pose a problem if the relationship between the entities is not specified in detail (joint liability, warranty, complementarity, and the like).

The draft principles clearly declare (in particular in the preamble) that the States are responsible for infringements of their obligations of prevention under international law. The emphasis on the primary liability of the operator does not relieve the State from its responsibility. In other words, there is no relief from liability of the State for an unlawful activity, that is, for being in infringement of its primary obligations. Prevention is, of course, one of those obligations, and the State is liable in case of its neglect. But the primary obligation of the State is also to ensure "prompt and adequate compensation" at a national level. In this respect, the State also risks being held liable for an internationally unlawful activity if it does not secure the injured party's right to compensation according to prescribed parameters. Such liability would probably consist, typically and predominantly, in compensation for damages, provided in the form of financial compensation where restitution is not possible.

From the point of view of international law, all this is only a logical consequence of the solution that was chosen. It is not necessarily a problem if, at the same time, there are rules regulating the relationship between the compensation paid as a consequence of the State's liability and the compensation paid by the operator, by a third party or in some cases even by the State (directly or indirectly). Since there is no rule stating that the former excludes (or proportionally reduces) the latter, there is no way to avoid multiple claims and parallel payment of compensation for the same damage (in the sense of material damage). This may involve large amounts of money that could eventually directly or indirectly burden the State budget.

**Mexico**

Mexico is pleased to note that the liability regime for activities included within the scope of the draft allocates liability primarily to the operator and that such liability is to be so imposed without proof of fault being required. Mexico believes that the correct way to proceed is to impose strict liability on the operator. That is consistent with international instruments in the area of civil liability and with the nature of hazardous activities.

Mexico believes that having to prove a causal connection would pose an excessive burden on innocent victims of such harm. In that regard, we consider that the emerging principles of international law, such as the "polluter pays" principle and the precautionary principle, should be extended to the procedural aspects, so that the burden of proof of a causal connection would not reside with the innocent victim. This could be achieved by allowing for presumption of causality and stipulating that the defendant must prove that no causal connection exists between the activity in question and the damage. We recommend that the Commission consider including this possibility in paragraphs (24) or (25) of the commentary on draft principle 4.

**Netherlands**

The Netherlands endorses the objective of the principles as expressed in principle 3, namely ensuring prompt and adequate compensation for transboundary damage. This is the core of the principles.

The Netherlands would observe that principle 1 should be read in combination with principle 3. The principles are about transboundary incidents for which prompt and adequate compensation must be provided. In the Netherlands's opinion, "adequate" means, at least, that the compensation given to victims in other countries should equal that given to victims in the State where the activity originated. The non-discrimination principle is a minimum standard but is not sufficient in all cases. Not all legal systems are equally developed. Since the rationale behind the principles is to compensate victims as well as possible, "prompt and adequate compensation" must sometimes mean more than the mere application of the non-discrimination principle and must also meet objective, absolute, minimum standards. In other words, "prompt and adequate compensation" should mean "compensation not less than national treatment, whichever is more favourable to the victim", as is also clear from paragraph 2 of principle 8.

The Netherlands believes that the implementation of principle 4 depends on implementation at the national level being non-discriminatory. States should take the "necessary measures" referred to in paragraph 1 of principle 4 at national level. The Netherlands would also observe that the phrase "necessary measures to ensure prompt and adequate compensation" is not preceded by a definite article and is not determined in any other way, for example by a word such as "all". The Netherlands is in favour of some such determiner.

The Netherlands agrees that proof of fault should not be required, as stated in paragraph 2 of principle 4, since strict liability applies here. Nevertheless, it is appropriate to issue a warning at the same time: the restrictions that accompany strict liability also apply. They relate, for example, to the level of compensation possible and the time limit on claiming compensation. The internationally accepted

restrictions imposed by international regimes already in force, such as damage caused by acts of war, also apply. However, the Netherlands takes the view that those restrictions cannot and must not go so far as to compromise the main objective, namely prompt and adequate compensation.

With regard to the question of what party should most appropriately be held liable, the Netherlands would observe that the operator is not always in the best position to accept liability. Sometimes it would be more appropriate to opt for the party or parties best placed to accept the risk and actually to provide compensation, as was done in the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and their Disposal.[16] From the point of view of victims, it is best if a single entity can be held liable. From an environmental point of view, it is even more clear-cut: it should be the entity that can exert the most effective influence on the risk. Since the principles are aimed at States, thus forming a general framework, the Netherlands concludes that specific agreements and/or treaties are required in practice to regulate the imposition of liability satisfactorily.

The Netherlands agrees with the far-reaching restrictions placed on the limitations and exceptions to liability in paragraph 2 of principle 4. However, the Netherlands would observe that the exceptions referred to in the Commission's commentary are not or are no longer used in the nuclear liability conventions.[17]

Where paragraphs 2 and 3 of principle 4 refer to "the operator or, where appropriate, other person or entity", the Netherlands proposes that this wording should be replaced by "the operator and any other person", since these terms are clearly defined in paragraph (e) ("operator") and the proposed paragraph (f) of principle 2 ("person" means any natural or legal person). Owners or suppliers could thus be held liable in addition to operators, as intended by paragraph 2 of principle 4.

The Netherlands agrees with paragraph 5 of principle 4. The obligation to make effective provision to cover any remaining liability on the part of the State is a progressive element that is very welcome from the point of view of victim protection. There is, however, no need to draw all the funds required for this purpose from the public purse: a fund could be established from resources provided by the operators.

The Netherlands proposes that the words "additional financial resources are allocated" in paragraph 5 of principle 4, should be replaced by "additional financial resources are available". After all, those resources need not all be taken from the public purse, and the words "are available" echo the usage of paragraph 1 of principle 4.[18]

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[16] See also *Official Records of the General Assembly, Fifty-ninth Session, Supplement 10* (A/59/10), para. 176, Principle 4, Commentary, para. (12).

[17] See ibid., paras. (27) to (29): "liability is excepted if, despite taking all appropriate measures, the damage was the result of (a) an act of armed conflict, hostilities, civil war or insurrection; or (b) the result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or (c) wholly the result of compliance with a compulsory measure of a public authority in the State of injury; or (d) wholly the result of the wrongful intentional conduct of a third party".

[18] Emphasis in original.

**Pakistan**

Paragraph 2 of principle 4 provides for the imposition of liability on the operator or entity without proof of fault. Such liability should be subjected to a thorough external investigation before fixing the operator's liability.

To ensure additional availability of funds in cases of insufficient compensation, the proposed funding mechanism may be linked with one of the existing funding mechanisms, such as that established for the United Nations Convention on the Law of the Sea or other similar conventions.

**Uzbekistan**

The title of principle 3 does not reflect its content. It would be better to call it "Objectives of the principles" and move it to the beginning of the draft principles.

## F. Principle 5 — Response measures

**Netherlands**

Principle 5 forms a bridge between the draft articles on Prevention of Transboundary Harm from Hazardous Activities and the principles. Moreover, from a methodological point of view, principle 5 does not in fact concern — or concerns only in part — the matters that the principles are supposed to regulate,[19] for the objective of the principles is to allocate costs for harm already incurred. In contrast, principle 5 is about avoiding further damage and paying for measures to that end. However, given the practical connection between compensation for damage done and the prevention of further damage, it is good that principles 5 and 7 were included. It must be borne in mind here that operators must be genuinely capable of restricting the damage if they are to be assigned any meaningful task.

## G. Principle 6 — International and domestic remedies

**Czech Republic**

Problems that are not fully solved by substantive law (inadequate regulation of the conditions of compensation) may still be addressed at the procedural level by forbidding a repeated or parallel suit for damages. The solution of international and domestic remedies proposed in principle 6 is even more vague than the substantive regulation of liability. According to the draft principle, the States should only ensure the remedies, whether in the form of international procedures (i.e. arbitration, global compensation) or at the level of domestic administrative and judicial mechanisms. Obviously, this is only a framework regulation, details being left to special treaties. However, the problem is that the State should at least enable access by injured foreigners to its domestic procedures on a non-discriminatory basis. Nevertheless, the draft principle does not regulate the choice of a forum, and probably allows for

[19] This also applies to part of principle 7: "States should cooperate in the development of appropriate international agreements on a global, regional or bilateral basis in order to make arrangements regarding the prevention and response measures to be followed in respect of particular categories of hazardous activities as well as the compensation and financial security measures to be taken."

free choice in this respect (or "forum shopping"). In addition, there may exist international mechanisms allowing for an expeditious settlement of claims (which the draft supports). This implies that instead of the traditional diplomatic protection, conditional on exhaustion of diplomatic remedies, prompt arbitration should be made possible.

Like the substantive law, which fails to regulate the relationship between parallel compensation claims, the procedural rules fail to regulate the relationship between suits brought in more than one national or even international institution. There is no doubt that the proposed framework principles are primarily designed to protect the victim, that is, to ensure prompt and adequate compensation for damage. However, some examples taken from other fields of international law, such as disputes concerning the protection of international investments, show that even a well-meant regulation can turn against the State that adopted it. Where there are multiple treaty regimes regulating compensation and related procedures, there is also a risk of multiple suits being brought against different entities, including the State, or against one entity in different forums.

In order to ensure legal certainty for defendants (but also of plaintiffs), it would be appropriate to respect, also in international instruments, the general principles of its litispendence (*lis pendens*) and of *res iudicata*. International treaties on human rights may serve as a model, since they do not allow a complaint to be lodged with more than one international controlling body (for example, the European Court of Human Rights, the Human Rights Committee, and so on).

According to the Czech Republic, the issue of procedural remedies (at the international as well as national levels) and their interrelationship needs further elaboration.

**Netherlands**

The Netherlands would point out that the non-discrimination principle has — rightly — been incorporated in principle 6 as well, in connection with legal procedures. It would also stress the need for effective remedies, as referred to in paragraph 3 of principle 6.

The Netherlands believes it conceivable that the question could be asked whether, if a State failed to fulfil its obligations under the prevention articles, this would give rise to aggravated liability or at least whether it could be argued that the liability is greater than if no obligation had been violated. However, the Netherlands concludes that the principles are intended solely to ensure compensation for harm actually suffered and not to impose punitive damages.

The Netherlands advises the Commission to include choice of forum and recognition of judgments in principle 6. Although those matters are discussed in the commentary, no conclusions are drawn regarding the content of principle 6.

As to the exclusive choice of forum made by the Commission, the Netherlands observes that from the victims' point of view it would at first sight seem advisable, unlike the Commission, to allow for a choice of forum to be made.[20] However, this could mean that an unwise choice is made and the victim is faced with a *forum non*

[20] See *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 176, Principle 6, Commentary, para. (8).

*conveniens*. The eventual choice was therefore that proceedings should take place in the country where the damage was caused. The Netherlands supports that decision. Practical experience teaches that the treaties that provide for exclusive liability (oil damage and nuclear damage) are the only ones in the category that work well. It should also be remembered that if funds were available to several uncoordinated forums, it could obviously cause problems. Accordingly, effective victim protection does not necessarily mean that more than one remedy is available. The Lugano Convention and the Basel and Kiev Protocols, however, do provide for a choice of forum.[21] Opting exclusively for the State where the damage was caused is also the simplest option from the point of view of enforcement of judgments.

## H. Principle 7 — Development of specific international regimes

### Netherlands

The Netherlands would observe that the provisions in the draft articles on Prevention of Transboundary Harm from Hazardous Activities relating to the settlement of disputes cannot be employed here: in the draft articles, disputes are about whether or not damage could have been prevented. Further, the Netherlands would like to point out the importance of coordinating liability where prevention and compensation regimes either fail or do not exist.

The Netherlands stresses that regimes must be effective and appropriate. It is not simply a question of concluding more treaties: rather, there should be better treaties with better implementation.

### United States of America

The United States observes that draft principle 7 encourages States to cooperate in the development of appropriate international agreements. Without prejudice to States' sovereign discretion to pursue such agreements and what they should contain, we would emphasize that the contexts in which specific liability regimes might be developed vary widely (for example, such negotiations might concern quite distinct industrial sectors), and it should be recognized that the approaches chosen may differ accordingly. In accordance with this, our view is that international regulation in the area of liability ought to proceed in careful negotiations concerned with particular topics (for example, oil pollution, hazardous wastes) or with particular regions (for example, the recently concluded negotiations of annex VI to the Protocol on Environmental Protection to the Antarctic Treaty addressing liability arising from environmental emergencies). We believe that it is only in specific contexts that States can appropriately consider the kinds of matters that the Commission has rightly suggested need to be addressed in any liability regime.

[21] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (*European Treaty Series. No. 150*); Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Waste and their Disposal (1999); Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the Convention on the Transboundary Effects of Industrial Accidents (Kiev, 2003).

## I. Principle 8 — Implementation

### Mexico

An important aspect of draft principle 8 is the Commission's express reference to the need for States to adopt measures to incorporate the principles, thereby strengthening their implementation and, as a result, reinforcing protection of the environment.

### Netherlands

The Netherlands would like to emphasize the importance of paragraph 2 of principle 8 and point out its connection with article 15 of the draft articles on Prevention of Transboundary Harm from Hazardous Activities, although clearly the latter is concerned with damage that already exists, such as, oil discharged from a ship that has foundered, where the only concern is to minimize the pollution damage, for example, to the coast (see also principle 5 and article 16 of the draft articles).

Whereas the wording of paragraph 3 of principle 8 is "States should cooperate with each other to implement the present draft principles consistent with their obligations under international law", the preamble uses the more peremptory word "shall" ("States shall be responsible for infringements of their obligations of prevention under international law"). The Netherlands definitely prefers the latter.

### Uzbekistan

The title of principle 8, "Implementation", should be expanded, as follows: "Measures to be taken by the State to implement the provisions of the principles".

Uzbekistan believes that it would be advisable to reflect in paragraph 2 the list of relevant factors in the principle of non-discrimination, taking into account the provisions of the Universal Declaration of Human Rights,[22] of 10 December 1948, particularly with respect to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

## J. Final form

### Mexico

The drafting should stress the legal obligation attaching to the activities regulated here; therefore the provisions of the instrument should be drafted in the form of rules (in articles) and not merely as principles. We must remember that the purpose of the draft is not only to develop international law but to codify rules applicable to those situations in which damage is caused by acts not prohibited by international law.

Moreover, Mexico recalls that General Assembly resolution 56/82, paragraph 3, states that, in its work on this topic, the Commission should bear in mind the interrelationship between prevention and liability. Accordingly, the same treatment should be given to the provisions on liability as to those on prevention.

[22] Resolution 217 A (III).

Mexico still has doubts about the use of the term "allocation of loss" in the title of the subtopic since one of the main functions of the liability regime is to provide compensation for damage and not just to distribute "loss". Moreover, the term used would appear to create a legal regime for damage compensation different from the rules derived from the legal principle of "polluter pays". However, Mexico recognizes that the title is a secondary issue, provided the draft takes the form of articles rather than principles.

If the Commission decides that the provisions should continue to take the form of principles, as at present, Mexico considers it essential to reformulate some of them (in particular, principles 4 to 8) so that they are prescriptive rather than hortatory in nature. Therefore, we would recommend replacing the word "should" by the word "shall" in the draft (see, for example, principles 4 and 8).

Mexico believes that the Commission should seize the opportunity, as it considers this very important topic, to establish a clear, fair and prescriptive set of rules with the ultimate aim of protecting the global environment and ensuring that the "polluter pays". To provide prescriptive rules on prevention of damage but not on compensation in the event of accidents would undoubtedly result in an unbalanced and inequitable treatment of the topic, which would not contribute to the legal certainty being sought.

**Netherlands**

The Commission has said that it will examine the question of the final form to be taken by the instrument during the second reading of the principles. If the Commission plans to draft a framework agreement, the Netherlands believes that this would mean further negotiations on principles 4 to 8 and that the Commission would have to make some additions, particularly on dispute settlement and the reconciliation of the draft articles on the prevention of transboundary harm with other international instruments.

The Netherlands hopes that as many States as possible take an active part in the further discussion of the principles, in the formal discussion of this part of the Commission's report to the Sixth Committee as well as elsewhere. The Netherlands hopes that the Commission's report will inspire bilateral, regional and other multilateral agreements and provisions on transboundary harm caused by hazardous activities.

**United States of America**

In the light of the fact that the Commission reserved the right to return to the question of final form during the second reading of the draft principles, we wish to record our strong agreement with the Commission that the principles are more likely to gain widespread acceptance in their current form than they would be were they not recommendatory.[23] Such acceptance is also more likely in light of the decision to avoid controversial assertions not necessary for the exercise, such as general assertions regarding precaution, "polluter-pays", or the global commons.

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[23] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), para. 176, General commentary, para. (14).